

## STIPULATIONS

The stipulations are hereby adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

### ISSUES

- (1) Did claimant's accidental injury arise out of her employment with respondent?
- (2) Did claimant's death result from her accidental injury?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein and having considered the briefs and arguments of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant's accidental injury did not arise out of her employment.

The Kansas Workers Compensation Fund brought this claim against respondent pursuant to K.S.A. 44-570(a) for the statutory \$18,500 death assessment. Apparently the deceased had no dependents and other than this instant action there were no other claims or actions arising from the decedent's alleged the work-related accident or subsequent death which occurred nine days later.

The burden of proof is upon the party claiming benefits, in this case the Workers Compensation Fund, to establish its right to an award for compensation by proving all the various conditions on which its right to a recovery depends. This must be established by a preponderance of the credible evidence. See Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984); K.S.A. 1995 Supp. 44-508(g).

"Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case." Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, Syl. ¶ 3, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

It is the function of the trier of fact to weigh the evidence to determine the credibility of witnesses, to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with any other testimony that may be relevant. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Decedent was a 76-year-old CNA who at the time of her accident was working for the Bethesda Home. It is alleged that claimant met with personal injury by accident on December 5, 1995, while in the course of her employment with the respondent. On the date of accident she was walking in a hallway when she fell to the floor injuring her hip. Claimant had a well-documented preexisting right peroneal nerve apraxia secondary to preexisting lumbar spinal stenosis. This resulted in a condition commonly described as "footdrop."

There is no evidence that the condition of the floor caused or contributed to the fall or that decedent was doing anything other than simply walking when she fell.

Decedent related to her daughter-in-law, Paula Guhr, that her leg just gave out. In a statement written down by Vici Murphy, LPN, the decedent said her leg doesn't work right and her shoe hooked on the floor. The Fund alleges that claimant's injury arose out of her employment due to the fact that she tripped and fell at work and suffered the resulting injury. It is the Fund's position that "whether her fall was caused or contributed to by a pre-existing condition is not of any relevance to the issue [of arising out of] in this case." The Board disagrees.

In Bennett v. Wichita Fence Co., 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992) the claimant suffered an epileptic seizure while driving a motor vehicle for his employer and struck a tree. The Court of Appeals found:

"Where the injury is clearly attributable to a personal condition of the employee, and no other factors intervened to cause or contribute to the injury, no compensation award is allowed; but where the injury is the result of the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed." Syl. ¶ 2 at 458.

An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidence of the employment. Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980); Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979); Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

Respondent argues that the Fund has not presented evidence that the work activity either caused decedent to fall or that the resulting injury was in any way causally connected to her employment. Rather, the employment did not expose claimant to any increased risk of injury beyond what would otherwise be incidental to normal day-to-day living activities. In the Kansas Supreme Court case of Cox v. Refining Co., 108 Kan. 320, 195 Pac. 863 (1921), claimant had an epileptic seizure at work and after becoming unconscious fell against some hot pipes and severely injured his back. The Supreme Court denied compensation holding that:

"[T]he accident which caused plaintiff's injury flowed from his epileptic seizure, and that this particular recurrence of periodic malady from which claimant had suffered for so many years was not provoked by his employment, nor did his employment contribute in any degree to bring on such epileptic seizure." Cox at 327.

The Appeals Board finds that the decedent did not suffer personal injury by accident arising out of her employment with respondent. The injury suffered by decedent in this case is clearly attributable to a personal condition of the claimant. The evidence does not establish the employment placed claimant in a position which caused or increased the

effects of her fall so as to make compensable the injuries sustained by decedent in the accident.

(2) Due to the Board's finding on Issue No. 1, the second issue of whether decedent's death was causally related to her accidental injury is moot.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 28, 1997, should be, and is hereby, reversed and the Workers Compensation Fund is denied benefits pursuant to K.S.A. 44-570.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the Workers Compensation Fund.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1997.

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BOARD MEMBER

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c: Jeffrey A. Chanay, Topeka, KS  
Steven L. Foulston, Wichita, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director